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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. ——

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

JOHN BROWN, IRVIN L. GOSSETT AND J. C. WEST, JR., D/B/A BROWN FOOD STORE; TOOTIE SCHNAUBERT D/B/A CASHWAY FOOD STORE; SAFEWAY FOOD STORE, INC.; ARNOLD CRABB D/B/A THRIFTY WAY FOOD STORE

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The Solicitor General, on behalf of the National Labor Relations Board, petitions for a writ of certiorari to review the judgment of the Court of Appeals for the Tenth Circuit entered in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 12–21) is not yet reported. The findings of fact, conclusions of law, and order of the Board (R. 4–12, 20–27)[1] are reported at 137 NLRB 73.

[1] "R." refers to the Transcript of Record in the court of appeals. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

JURISDICTION

The judgment of the court of appeals was entered on June 17, 1963 (App. A, *infra*, p. 21). On September 16, 1963, Mr. Justice White extended the time for filing a petition for a writ of certiorari to and including October 16, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Section 10(e) of the National Labor Relations Act, as amended.

QUESTION PRESENTED

Whether the National Labor Relations Board could properly find it to be an unfair labor practice, when a struck member of a multi-employer bargaining unit attempts to operate with replacements, for the other members to hire replacements in the places of their regular employees represented by the union, even though the regular employees are able and willing to work.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth in Appendix B, *infra*, pp. 22–23.

STATEMENT

A. The Board's findings of fact

Respondents are retail food store operators in Carlsbad, New Mexico, who have bargained on a group basis with the Retail Clerks International Association, Local 462. Each company recognizes the Union as the bargaining agent for all its clerical employees, and each participates in joint negotiations which culminate in the execution of a collective bargaining agreement binding upon all (R. 20; 41–42).

The Union and the employers' bargaining group commenced negotiations for a new contract in January 1960. While negotiations were in progress, the employers met among themselves and agreed that all would send their employees home if the Union should strike any of the stores (R. 20; 37, 39–40, 46, 54, 56). By March 2, the parties had agreed upon all contract terms except wages (R. 20). On that day the Union authorized a strike. When the Association was informed, it replied that it would consider a strike against any member of the bargaining group to be a strike against all (R. 42).

On March 16, the Union struck and picketed Food Jet, one of the Association members. The other four employers, who operated six stores, were immediately notified, and all responded by sending home their own employees (R. 37). The employees of the non-struck employers who reported for work that day were met by their store managers and were told that, because of the strike at Food Jet, they were locked out until further notice, or until the strike terminated (R. 28, 29, 31, 46, 50).

Shortly after the strike began, Food Jet hired replacements for the vacancies left by the strikers, and it continued operations (R. 20; 35). The non-struck employers, while continuing their lockout, functioned with managerial personnel, with relatives of management, and with temporary help expressly hired only for the duration of the strike (R. 20–21; 38, 45, 46–47, 48–51, 53–54). Some of these employers also obtained the services of employees transferred from other stores outside the Association (R. 30, 34, 48–49).

Meanwhile, the parties continued to negotiate and, on April 22, 1960, they reached final agreement on all contract terms. Thereupon, the Union terminated the strike. Respondents then dismissed the temporary replacements and recalled their regular employees (R. 21; 42, 50, 55, 58–59).

B. The Board's decision and order

Distinguishing the instant case from the *Buffalo Linen* decision,[2] the Board (with two Members dissenting) concluded that the nonstruck employers violated Sections 8(a) (1) and (3) of the Act by temporarily replacing their regular employees because of the Union's strike against Food Jet. In arriving at this conclusion, the Board reasoned as follows (R. 22–23):

> While the present case has its similarity to the *Buffalo Linen* situation, there is a critical difference between the two cases. The underlying rationale of *Buffalo Linen* was that a shutdown was deemed appropriate to preserve the established unit, and that the lockout incidental to such shutdown was not unlawful. In the instant case, however, there was no shutdown to protect a bargaining unit, for Respondents continued to operate by hiring replacements after locking out their employees. Therefore, whatever defensive validity there may be for shutting down in a whipsaw context, such consideration is inapposite where, as here, the employers do not shut down. * * *
>
> We conclude, in balancing the conflicting interest of the employees and the Respondents

[2] *National Labor Relations Board* v. *Truck Drivers Local 449*, 353 U.S. 87 [hereinafter *Truck Drivers*].

> under the particular circumstances of this case, that the nonstruck Respondents were not justified in replacing their employees because of a strike called by the Union against Respondent Food Jet. Locking out employees in order to replace them with other workers may hardly be viewed as equivalent to the defensive action of a shutdown to preserve the solidarity of the Association unit. On the contrary, since the Respondents were continuing to operate and since no reason appears why they could not have continued to operate with their own employees during the strike, this constitutes a temporary replacement of employees solely because they were engaging in protected concerted activity, i.e., striking against Food Jet.

Accordingly, the Board ordered respondents to cease and desist from these unfair practices and to reimburse their employees for pay losses resulting therefrom.

C. The decision of the court of appeals

The court of appeals denied enforcement of the Board's order. It held that temporary replacement of regular employees was an appropriate defensive measure to preserve the integrity of the multi-employer bargaining unit within the meaning of this Court's decision in the *Truck Drivers* case. Chief Judge Murrah dissented. He said that the *Truck Drivers* case had held that "the process of balancing conflicting interests * * * [is] a function * * * within the Board's exclusive province," and that the "specialized judgment" of the Board was entitled to stand in this case (pp. 20–21, *infra*).

REASONS FOR GRANTING THE WRIT

The court of appeals has misapplied and improperly extended the decision of this Court in *National Labor Relations Board* v. *Truck Drivers Local No. 449*, 353 U.S. 87, and has reversed the National Labor Relations Board's policy determination in an area in which this Court has held the Board to have primary responsibility, subject to only limited judicial review.

In the *Truck Drivers* case the Court sustained the Board's ruling that members of a multi-employer bargaining unit do not commit an unfair labor practice if, during contract negotiations, they lock out their own employees in response to the union's calling a strike against one of the employer members. Although such a lockout literally "interferes with" the employee's right to engage in "concerted activities" (Sections 7, 8(a)(1)), the interference was thought not to violate Section 8(a)(1) because of the need to accommodate the employers' interests in preserving the integrity of the multi-employer bargaining unit. A strike against one member of a multi-employer unit seeks to use the sales and services of the remaining members to increase the pressure upon the struck member to capitulate to the union's demand; stated conversely, it seeks to deprive the multi-employer association of the economic strength of the combination. Since such a strike against one member of the unit carries the implicit threat of successive strikes against each of the other firms individually, with the "calculated purpose" of causing "successive and individual employer capitulations,"[3] the whipsawing tech-

[3] *Buffalo Linen Supply Co.*, 109 N.L.R.B. 447, 448.

nique necessarily threatens to destroy the integrity of the bargaining unit. In order to protect bargaining on a group basis and retain group power in negotiations, the Board held, and [this] Court agreed, that the employers might lawfully counter the strike against one member with a lockout by all the members.

The decision below converts the privilege of taking that limited defensive action into a right to use a further offensive weapon that the Board has condemned. When the Union struck Food Jet, the other six grocery stores were privileged, under the *Truck Drivers* decision, to lock out their own employees, treating the strike against Food Jet as essentially a strike against all the employers in the bargaining unit. They retained that privilege even though Food Jet later attempted to resume operations. Not content with this, the other stores took the offensive against the Union and replaced employees who were available and willing to work, with strike-breakers whose virtue apparently was that they had no connection with the striking union. The layoffs can only be described as reprisals against the Union and its members designed to punish them for the strike at Food Jet, while the employers continued business operations. Manifestly, this was the rankest kind of discrimination. It has long been settled that an employer violates Section 8(a)(1) and (3) of the Act if he denies an ex-striker an open position because he went on strike.[4] Even

[4] *National Labor Relations Board* v. *Mackay Radio & Telegraph Co.*, 304 U.S. 333, 347; *National Labor Relations Board* v. *Remington Rand, Inc.*, 130 F. 2d 919, 927–928 (C.A. 2); *National Labor Relations Board* v. *Globe Wireless, Ltd.*, 193

the struck employer, Food Jet, would have committed an unfair labor practice had it hired replacements for open jobs, in the place of strikers who wished to return to work. *A fortiori* the discrimination is unfair when employees who did not strike are replaced because their union has struck another concern. The discrimination is as improper when the replacement is temporary as it is when the new employee is permanent.

The court below reasoned that, when the struck employer attempts to continue operations, recognition of a privilege to replace the non-striking employees during the ensuing lockout is necessary "if unity of the multi-employer group is to be maintained" (p. 17, *infra*). The reasoning involves two misconceptions. In the first place, the struck employer himself would have no privilege to put a replacement in the job of an employee who was willing and able to work.[5] The right to hire replacements is limited to hiring substitutes for employees who insist upon going and staying on strike. Respondents' employees all were able and willing to work.

F. 2d 748, 749 (C.A. 9); *Home Beneficial Life Insurance Co.* v. *National Labor Relations Board*, 159 F. 2d 280, 285 (C.A. 4); *National Labor Relations Board* v. *National Shirt Shops*, 212 F. 2d 491, 494 (C.A. 5); *National Labor Relations Board* v. *J. Mitchko, Inc.*, 284 F. 2d 573, 576–577 (C.A. 3).

[5] See *National Labor Relations Board* v. *Shenandoah-Dives Mining Co.*, 145 F. 2d 542, 547 (C.A. 10); *National Labor Relations Board* v. *Robinson Freight Lines*, 251 F. 2d 639, 641 (C.A. 6); *National Labor Relations Board* v. *Anchor Rome Mills*, 228 F. 2d 775, 780 (C.A. 5); *Firth Carpet Co.* v. *National Labor Relations Board*, 129 F. 2d 633, 636 (C.A. 2); *National Labor Relations Board* v. *Luzerne Hide & Tallow*, 188 F. 2d 439, 442 (C.A. 3), certiorari denied, 342 U.S. 868.

Second, the employer members of an association who have not been struck can keep all the members of the association "in the same boat," either by shutting down entirely, or by curtailing their business and laying off roughly the same percentage of their normal complements of workers as the struck employer is lacking, or, if the struck employer has resumed full operations, by resuming business as usual. With this range of choices available the members of the employer association cannot justify the discrimination as necessary to avoid being pawns in the union's attempt to whipsaw them individually. Discriminating against regular employees in favor of replacements, therefore, serves no purpose but reprisal against the union.

Not only did the court of appeals err in its substantive analysis of the problem, but it rendered the decision in disregard of the teaching of the *Truck Drivers* case by undertaking to make its own appraisal and accommodation of the diverse interests. In the *Truck Drivers* case, this Court held (353 U.S. at 96)—

> The ultimate problem is the balancing of the conflicting legitimate interests. The function of striking that balance to effectuate national labor policy is often a difficult and delicate responsibility, which the Congress committed primarily to the National Labor Relations Board, subject to limited judicial review.

This principle was expressly re-affirmed last Term in *National Labor Relations Board* v. *Erie Resistor Corp.*, 373 U.S. 221, 235–237.

The distinction which the Board has drawn between defensive lockouts and reprisals in the form of layoffs and replacement is the very kind of delicate adjustment that the Board is charged with making on the basis of its knowledge of the practical consequences. The Board is the agency established by Congress to determine whether replacing locked-out employees who are willing to work is the substantial equivalent of replacing employees who go on strike, or is an offensive weapon against the union which has no justification in view of the availability of other methods of preserving substantial parity and resulting unity among the members. In substituting its judgment for that of the Board, the court of appeals exceeded the proper limits of judicial review.

Although the precise issue is novel, the importance of multi-employer bargaining makes it desirable that this Court promptly correct the misapplication of its decision in the *Truck Drivers* case. Multi-employer bargaining is common throughout the United States. It is estimated that in 1961 about half of the 329 major collective bargaining agreements (*i.e.*, contracts covering 5,000 or more workers) were multi-employer agreements.[6] Thousands of smaller employers, especially in distribution industries, negotiate through multi-employer associations. The question presented here, like that in the *Truck Drivers* case, will determine one of the basic rules for multi-employer

[6] *Major Union Contracts in the United States, 1961*, U.S. Department of Labor, BLS Bull. No. 1353, p. 4 (GPO, Dec. 1962).

bargaining. Thus, it affects many thousands of employers and millions of employees.

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted.

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OCTOBER 1963.

APPENDIX A

United States Court of Appeals Tenth Circuit

May Term, 1963

No. 7089

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

JOHN BROWN, IRVING L. GOSSETT AND J. C. WEST, JR., DOING BUSINESS AS BROWN FOOD STORE; TOOTIE SCHNAUBERT, DOING BUSINESS AS CASHWAY FOOD STORE; SAFEWAY FOOD STORE, INC.; AND ARNOLD CRABB, DOING BUSINESS AS THRIFTY WAY FOOD STORE, RESPONDENTS

On Petition for Enforcement of an Order of the National Labor Relations Board

Before MURRAH, *Chief Judge,* and LEWIS and BREITENSTEIN, *Circuit Judges.*

LEWIS, *Circuit Judge*:

This case presents a single problem but one novel and important in the area of multi-employer bargaining under the National Labor Relations Act. The determinative issue broadly stated, is whether the non-struck members of a multi-employer bargaining group who have locked out their employees following the initiation of an economic strike against one member of the bargaining group may operate with temporary replacements. The National Labor Relations Board, two members dissenting, found that the hiring of replacements by the non-struck employers rendered the lockout un-

lawful and hence violative of Secs. 8(a)(1) and 8(a)(3) of the Act. The present petition seeks enforcement of the Board order requiring certain remedial action upon the part of respondents.[1] The alleged unfair labor practices having occurred in Carlsbad, New Mexico, this court had admitted jurisdiction under Sec. 10(e) of the Act. 29 U.S.C. sec. 151, et seq.

The case arises from a factual background which leaves the determinative question free from the complication of disputed side issues of fact or law. Respondents are operators of seven retail food stores in Carlsbad, New Mexico, who have traditionally bargained upon a group basis[2] with the recognized bargaining agent of its clerical employees, Local 462 of the Clerks International Association. For many years the Union and respondents had enjoyed an amicable relationship and their collective bargaining procedures had resulted in agreements containing a union shop provision and in settling problems of wage increases and similar customary subjects of negotiation. On September 17, 1959, the Union gave notice of its desire to bargain on proposed changes in the then current contract which was due to expire shortly. The notice was not timely but respondents waived the technicality and agreed to bargain. The parties met on

[1] Originally named in the charges were Food Jet, Inc. and Lenn Jones, Agent of Multi-Employer Bargaining Association, but each was found not to have violated any provision of the Act. The present petition thus seeks no enforcement aid against either but Food Jet, Inc., is sometimes included in general references made to respondents.

[2] Multi-employer bargaining is a recognized and generally successful negotiating procedure of benefit to labor and management alike. Amici Curiae point out that in Southern California approximately 1014 food operators bargain as a single unit with the various Locals likewise coming to the bargaining table together.

January 15, 1960, and both Union and respondents bargained in good faith at numerous sessions thereafter. By February 17, 1960, complete accord had been reached as to all provisions of the new contract except the amount and retroactivity of wage increases. Bargaining continued and at a session held March 2 the Union informed respondents that a strike vote had been taken and a strike authorized. No information was given as to when, how or against whom the threatened strike would be effectuated. Respondents replied that "they would consider a strike against any of them to be a strike against all of them."

On the morning of March 16 the Union struck a single store, Food Jet, Inc.[3] Respondents immediately locked out their employees and informed them they would not be allowed to work for the duration of the strike against Food Jet, Inc. Each store operated on a limited basis during the strike and lockout. Food Jet, Inc., hired replacements for its striking employees; Safeway closed one store but operated another through the transfer of personnel from other areas; the other respondents remained open through the efforts of supervisory employees, relatives and temporary employees hired only for the duration of the controversy. Bargaining between the Union and respondents continued and resulted in an agreement reached on April 22, 1960. All regular employees were immediately returned to work with full status rights and benefits.

[3] This action is the initial step in the so-called "whipsaw" strike. Usually the smallest of the group is struck in order to focus the economic burden of the strike at the weakest point. If successful at this point, successive strikes follow against other single members of the group until the final goal is accomplished. The technique is not novel to labor problems and finds use in many aspects of economic, and, indeed, political life.

The decision of the Board that the act of respondents in hiring replacements is discriminatory in violation of Sec. 8(a)(3) and coercive in violation of Sec. 8(a)(1) is not premised upon evidentiary findings of unlawful motivation and hence does not fall within that class of cases where an otherwise permissible course of conduct by an employer may be rendered unlawful by the specifics of subjective intent. *Labor Board* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 57 S. Ct. 615, 81 L. Ed. 893; *Associated Press* v. *Labor Board*, 301 U.S. 103, 57 S. Ct. 650, 81 L. Ed. 953; *Olin Mathieson Chem. Corp.* v. *Labor Board*, 352 U.S. 1020, 77 S. Ct. 587, 1 L. Ed. 2 562. And see *Utah Plumbing and Heating Contractors Assn.* v. *N.L.R.B.*, 10 Cir., 294 F2 165. But lack of evidence of specific unlawful intent by an employer is not fatal to the decision of the Board if the conduct is such to carry its own indicia of intent sufficient to place the question within the orbit of the Board's prerogative of balancing the legitimate interests of labor and management in furtherance of the general purposes of the Act. *N.L.R.B.* v. *Erie Resistor Corp.*, — U.S. —, decided May 13, 1962. The crux of the Board decision here is premised upon an ultimate finding of unlawful intent based upon indicia appearing from the uncontaminated course of conduct of respondents in hiring replacements. The Board expresses it thus:

> If the union could successfully strike one at at a time, the other members of the employer unit would in ordinary circumstances continue operating to the severe economic damage of the struck member, and each in turn could be driven to the wall in the "whipsaw". For this reason, if one member is shut down by a strike, the others may also shut down, but they are not required to do so. If the struck member operates through replacements, no economic

> necessity exists for the other members shutting down. If in those circumstances they resort to a lockout and hire replacements, it may be reasonably inferred that they do so not to protect the integrity of the employer unit, but for the purpose of inhibiting a lawful strike. In short, the lockout in these circumstances ceases to be "defensive" and becomes "retaliatory".

Can it be reasonably inferred that the act of hiring replacements, per se, is "retaliatory" rather than "defensive"? We think it cannot and hold that the Board in so doing has misinterpreted and misapplied the principles set forth by the Supreme Court in *Labor Board* v. *Truck Drivers Union* (*Buffalo Linen*), 353 U.S. 87, 77 S. Ct. 643, 1 L. Ed. 2676, and *Labor Board* v. *Mackay Radio & Tel. Co.* (*Mackay*), 304 U.S. 333, 58 S. Ct. 904, 82 L. Ed. 1381.

In *Buffalo Linen* the Court gave its stamp of approval to the recognition by the Board that after the initiation of a whipsaw strike a threat of strike existed against the other employers which created an economic problem legally justifying a temporary lockout of employees. Basically we interpret *Buffalo Linen* as upholding the legitimacy of multi-employer bargaining and a recognition that to preserve the equality of such bargaining the employer may resort to self-help when the legitimate interests of employer and employees collide. Thus the efforts of the whipsaw strike to atomize the unity of the multi-employer group can be lawfully neutralized by the utilization of a temporary lockout. The decision in *Buffalo Linen* went no further for the factual background went no further. In the case at bar neither Food Jet, Inc., the struck employer, nor respondents, who locked out, remained totally inoperative as in *Buffalo*. Here, each remained in limited operation by hiring temporary replacements.

In *Mackay*, the Supreme Court firmly established the general right of a struck employer to preserve his business by the hiring of replacements for strikers. Such right cannot be exercised in a discriminatory manner however. *Labor Board* v. *Erie Resistor Corp., supra.* The decision of the Board in the case at bar recognized the right of the struck employer, Food Jet, Inc., to replace and hence found it, but only it, not in violation of the Act. Although recognizing the right of Food Jet, Inc., to hire replacements under *Mackay* and the right of respondents to shut down in order to preserve the integrity of multi-employer bargaining under *Buffalo Linen* the Board reasons that respondents could have stayed operative with their regular employees and thus there was no economic necessity for replacements. The Board's decision states in such regard:

> Locking out employees in order to replace them with other workers may hardly be viewed as equivalent to the defensive action of a shutdown to preserve the solidarity of the Association unit. On the contrary, since the Respondents were continuing to operate and since no reason appears why they could not have continued to operate with their own employees during the strike, this constitutes a temporary replacement of employees solely because they were engaging in protected concerted activity, i.e., striking against Food Jet.

We agree with the dissenting members of the Board that such view "renders largely illusory the right of lockout given them by the Supreme Court in *Buffalo Linen.*"

The impact of the Board's decision is such that a denial of a basic right by indirection is inherent in it if unity of the multi-employer group is to be maintained. After the initiation of a whipsaw strike the

struck employer may remain shut down, the other members of the group may lock out, and the unity of interest is thus maintained. But the struck employer is denied his right of replacement and the whipsaw tactic enjoys a privileged advantage. If, however, the struck employer does choose to operate with replacements and the other employers cannot replace after lockout, the economic advantage passes to the struck member, the non-struck members are deterred in exercising the defensive lockout, and the whipsaw strike again enjoys an almost inescapable prospect of success. Such was not the intent of *Buffalo Linen*. To the contrary, *Buffalo Linen* recognizes that a lockout is justified in order to assure "the preservation of the integrity of the multi-employer bargaining unit." It is no answer to say that the respondents could have remained in operation through retaining their regular employees. This merely denies the privilege of lockout and, through denial, refuses any consideration of the existence of the overriding business purpose which, as recognized in Labor Board v. Erie Resistor Corp., supra, may justify the invasion of union rights. The preservation of the multi-employer bargain unit, approved as it is by congressional consideration and judicial decision,[4] is necessary to assure economic justice. It would be largely destroyed by leaving in the hands of the striking agency the power, by law, to determine which employers among the group could remain operative and which could not.

However, we do not understand *Buffalo Linen* to hold, and we do not hold, that a permissible lockout after the initiation of a whipsaw strike places the locked out employees in the absolute status of the actual strikers. Varying conditions premising the lockout, actual motives arising either before or after the lockout, or any

[4] See Mr. Justice Brennan's discussion in 353 U.S. 95, 96.

number of possible factors may well bring particular cases within the area of the Board's primary responsibility of balancing legitimate interests by means of its expertise. We do hold that the Board has erred in its interpretation of *Buffalo Linen*, that the acts of respondents in hiring replacements, presented as they are here against an uncluttered background, do not carry such indicia of intent as to warrant an inference of unlawful motive, that the order of the Board clearly fails to balance the legitimate interests of the parties and constitutes a prohibited determination by the Board of the economic weapons available to employers faced with a whipsaw strike. *N.L.R.B.* v. *Insurance Agents Union*, 361 U.S. 477, 80 S. Ct. 419, 4 L. Ed.2 454.

Enforcement is denied.

Filed: United States Court of Appeals, Tenth Circuit Jun 17 1963.

ROBERT B. CARTWRIGHT,
Clerk.

MURRAH, *Chief Judge*, dissenting:

I would enforce the Board's Order for the very reason which prompted the Supreme Court to enforce the Order in *Buffalo Linen*. In that case, the non-struck members of the employer unit temporarily locked out their employees, and shut down their operations. The Board, in our case, construed its decision in Buffalo as departing "from a long line of its precedents," to hold that the lock out was not an unfair labor practice, but a "legitimate defensive means of protecting the integrity of the multi-employer bargaining unit against the disintegration threatened by the whip-saw strike." The Supreme Court sustained the Board's Order, as a proper exercise of its administrative function to strike a balance between the conflicting legitimate interests of the two bargaining units. In doing so, the Court emphasized that the balancing of the conflicting inter-

ests at the bargaining table was "often a difficult and delicate responsibility, which the Congress committed primarily to the National Labor Relations Board, subject to limited judicial review."

In the process of balancing the conflicting interests, in our case, the Board found a "critical difference" between a defensive shut down, in Buffalo, and the lock out and continued operations with replacements, as here. It reasoned that, in the context of our case, "locking out employees in order to replace them with other workers may hardly be viewed as equivalent to the defensive action of a shut down to preserve the solidarity of the association unit;" that "if the struck member operates through replacements, no economic necessity exists for the other members shutting down;" and, that a lock out and replacements, in these circumstances, may form the basis for an inference that such action was taken "not to protect the integrity of the employer unit, but for the purpose of inhibiting a lawful strike."

The Board was, indeed, sharply divided in its analysis and application of Buffalo to the facts of our case, and the consequent inference to be drawn from the respondent's conduct here. But, the majority view, nevertheless, prevails as the specialized judgment of the Board in its "spacious domain of policy," i.e., see: *Phelps Dodge* v. *N.L.R.B.*, 313 U.S. 177, 194, cited and relied upon in *Buffalo Linen*. In these circumstances, it is not within the judicial prerogative to resolve the contrariety in the Board. It is sufficient, on limited judicial review, that the majority determinations of the Board are within the ambit of policy administration. Certainly, it is not within the judicial prerogative to say that a shut down is illusory, unless the employer is allowed to continue operations with replacements, for to me, the very statement, on its face, involves the process of balancing conflicting interests at the bargaining

table—a function which, as we have seen, is within the Board's exclusive province.

JUDGMENT

Nineteenth Day, May Term, Monday, June 17th, 1963

Before Honorable ALFRED P. MURRAH, *Chief Judge*, Honorable DAVID T. LEWIS and Honorable JEAN S. BREITENSTEIN, *Circuit Judges*.

This cause came on to be heard on the petition of the National Labor Relations Board for enforcement of its order and was argued by counsel.

On consideration whereof, it is hereby ordered that enforcement of the order of the National Labor Relations Board be and the same is hereby denied. Judge Murrah dissented.

APPENDIX B

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. Sec. 151, *et seq.*), are as follows:

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

SEC. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8(a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day fol-

lowing the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9(a), in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 9(e) within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further,* That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

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SEC. 13. Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike or to affect the limitations or qualifications on that right.

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